United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

75-4207

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MILTON EVEREST MITCHELL - A20 374 726	:	No. 75-4207
(Buffalo)	:	Petition for Review of Deportation Order
Petitioner,	:	
v.	:	
IMMIGRATION AND NATURALIZATION SERVICE	:	
Respondent.	:	

BRIEF AND APPENDIX FOR PETITIONER

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Table of Contents

Questions Presented

1. Does the ratio decidendi, in the Reid. v. INS decision, (420 U.S., 619,95 S.Ct. 1164), constitute part of the rule of law that entry on a false citizenship claim is entry without inspection?

2. In the judicial interpretation of the inspection requirement, that inspection means inspection as an alien, is the term "as an alien" limited to situations when the alien submits himself as an alien; or could inspection "as an alien" also include situations in which the inspection was similar or equivalent to the inspection given an alien even though he did not present himself as an alien?

3. Do the decided cases -- which hold that the aliens in those decided cases had entered without inspection because they had not submitted themselves as aliens for inspection -- preclude a consideration that a particularly exhaustive pre-entry investigation of a false citizenship claim can be considered the functional equivalent of an inspection as an alien?

Table of Cases

Other Authorities

Statutes and Rules Involved In Issues

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FOR THE SECOND CIRCUIT

MILTON EVEREST MITCHELL - A20 374 726 (Buffalo)	:	
Petitioner,	:	No. 75-4207
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IMMIGRATION AND NATURALIZATION SERVICE	:	Deportation Order
Respondent.	:	

BRIEF FOR PETITIONER

Statement

This Court is requested, pursuant to 8 USC Sec. 1105(a) (1961 Supp.) 75 Stat. 651, to review the Final Order of Deportation entered against the petitioner by the Board of Immigration Appeals. Petitioner's principal contention has been that deportability, for entry without inspection as charged, was not sustained; or in the alternative, that related relief in the form of voluntary departure in lieu of deportation or statutory waiver of deportation under Section 241(f), should have been granted.

Without relief from this Court, petitioner, petitioner's United States citizen wife and petitioner's United States citizen children will experience the extreme

hardship of his being deported to Trinidad; since it appears from the record that INS will not grant a stay of deportation on compassionate grounds.

Permission to reapply for admission after deportation will be required for the petitioner's re-admission with an immigrant visa, for which he is otherwise eligible except for what will be an executed Order of Deportation against him. This application process is itself one involving considerable difficulty, if only for the time-consuming delay and the family separation that ensues from the extended separation during such processing.

The petitioner does not ask this Court to allow him to avoid the consequences of his violation of the Immigration laws.

Petitioner knows that he is deportable for his illegal entry into the United States, not under the implicit ground charged by INS, but by a more explicit ground. (Deportation more by explicit grounds and less by implicit grounds was one of the major objectives of the realigned deportation provisions of the 1952 I&N Act. See Legislative History of 1952 I&N Act.)

The inherent ground of deportability, of the petitioner, is waivable by statue.

The equities, of record, in his case, balance out, at least, the adverse factors of record. By comparison

with the regular standards of dispensation of administrative grace, the denial of voluntary departure in lieu of deportation appears to be a marked departure from the normal policy in this area.

Course of Proceedings and Disposition of Case Before the Agency

Even though the petitioner's principal contention is that deportability, as charged, was not sustained, this was not his original contention at the Deportation Hearing, at which he was initially found deportable. Neither was this contention raised up to the time of oral argument of the appeal.

Petitioner's entry on August 5, 1974 at Niagara Falls, New York, was the subject of the Deportation Hearing at which he was found deportable.

Therefore, the case actually began on August 5, 1974 at the point at which the petitioner had made a false citizenship claim, supporting that claim by the use of a certificate of birth relating to someone else.

This claim of citizenship was doubted by the primary inspector in the toll-like booth at the Rainbow Bridge, and he was referred for secondary examination in the Immigration Service office close to and adjoining the Rainbow Bridge while the taxicab which brought him to the Rainbow Bridge was awaiting the outcome of the hour-long

secondary examination of his doubted citizenship claim. (See Affidavit of Petitioner dated August 14, 1975.)

Petitioner's interrogation was so thorough that questions fully capable of eliciting excludability were directed to the petitioner, as much as if he were considered as coming within that part of Sec. 235 of the Act which provides, in pertinent part, as follows:

> "....Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States, whether or not he intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States or an alien and, if the latter, whether he belongs to any of the excluded classes enumerated in section 212....."

The petitioner was thereafter permitted to proceed to his stated destination of the bus depot about 500 yards away, under, what appeared from subsequent developments to be, continuous surveillance by the Immigration authorities.

After the completion of his surveillance for six hours within the border inspection area, petitioner was apprehended and made the subject of deportation proceedings for having entered without inspection in violation of Section 241(a)(2) of the I&N Act, USC 1251(a)(2). (See complaint of Border Patrol Agent in 8 USC Sec. 1325 Criminal Proceedings.)

At the deportation hearing the following day, August 6, 1974, at Buffalo, New York, petitioner was unrepresented by counsel, and pursuant to the pleading provisions of 8 CFR 242.16(b), and in response to questions put to him by the Immigration Judge, admitted the fact that he had entered the United States on an intentionally false claim of United States citizenship, and responded affirmatively that he understood that by entering as a citizen, he avoided inspection as an alien, and that he was technically subject to deportation. (See Hearing Transcript P. 2, lines 5 - 18.)

No mention was made by petitioner of his intensive questioning and detention for one hour before entry, nor of the continuous surveillance.

Pursuant to the pleading provisions supra, petitioner's admissions were held to also constitute a conceding of deportability under the charge; and the Immigration Judge, pursuant to 8 CFR 242.16(b), determined that deportability for entry without inspection under Section 241(a)(2), as charged, had been established by the admissions of the petitioner. The admissions, of course, did not include the information concerning his continuous surveillance before, during and after entry.

Petitioner's deportation was ordered and voluntary departure in lieu of deportation was denied.

On August 13, 1974 petitioner appealed the deportation order, initially, only against the refusal to grant voluntary departure as relief from deportation.

On January 16, 1975 the appeal was first amended, by way of Motion to Reopen proceedings, to request additional relief from deportation in the form of statutory waiver of deportation under Section 241(f), I&N Act, because of the possible availability of such relief arising from the scheduled argument of the REID V. INS case before the United States Supreme Court.

On March 18, 1975 petitioner's attorney presented oral argument before the BIA, Washington,D. C., only on behalf of the voluntary segment of the appeal. The Appellate proceedings were held in abeyance for the petitioner to later submit arguments on the issue of the Section 241(f) statutory waiver segment of the appeal. Up to the time of oral argument, no Court or administrative body had ruled that the deportation charge of entry without inspection, under Section 241(a)(2), precluded a statutory waiver of deportation under Section 241(f), I&N Act. Even the Second Circuit Court had then discussed the deportability charge only in connection with the otherwise admissible requirement of Section 241(f).

On April 8, 1975, the appeal was further modified by including in the Motion to Reopen, a challenge, for the

first time, of the sustainability of the deportation order itself. "Reid" had held that if the entry without inspection charge were sustained, independently of fraud or any other excludable ground, then Section 241(f) benefits were precluded and such benefits would only be available to aliens found deportable for excludability for fraud at entry. This holding of "Reid" had viewed the relevance of the deportation charge in a light quite different from that in which it was viewed by the Second Circuit, and therefore the petitioner decided to merge the additional issue of the sustainability of the deportation charge in the context in which it was disposed of in the Reid case.

Even though the Board had held the proceedings open for the purpose of receiving arguments on the issue of waiver of deportability that was already conceded, because of "Reid", the petitioner, on April 8, 1975, requested the opportunity to withdraw conceding deportability, even though he did not wish to also withdraw the admission of the allegations.

Petitioner wanted to add details to the bare facts contained in the earlier admissions, details that had to do with his surveillance before and after entry.

Petitioner believed that the open forum of a hearing would permit, without doubt of being self-serving, the details of the circumstances of his entry which would show

that he received an inspection that was the functional equivalent of an inspection as an alien, even though he had not submitted himself as an alien for inspection, and such details would dilute the clear, convincing and unequivocal evidentiary value of his earlier bare admissions.

Perhaps because the BIA had held the proceedings open for a Section 241(f) argument that was not previously tied in with the issue of whether deportability, as charged, was sustained, the Board on July 28, 1975 dismissed the appeal without recognizing petitioner's memorandum of April 8, 1975 as shifting the emphasis of the proceedings away from voluntary departure and waiver of deportation, and towards the question of sustaining the charge of deportation.

In the decision of July 28, 1975 the Board rejected, as the principal issue in the appeal, the question of Section 241(f) waiver of deportation.

On August 15, 1975 the Motion to Reargue and Reconsider such dismissal was submitted to the Board for the purpose of pinpointing the issues raised on appeal and which issues did not appear to have been discussed by the Board in the dismissal of July 28, 1975. This Motion was denied by the Board on September 18, 1975 thereby making final the Order of Deportation to which the instant petition for review is directed.

In summarizing the course of the many-tiered

proceedings and disposition of the case before the Agency, what the BIA finally decided September 18, 1975 can be described as follows:

1. The admissions of petitioner at the hearing was clear, convincing and unequivocal evidence of deportability, in that such admissions established that he submitted himself falsely as a citizen and not as an alien at entry.

Going beyond his admissions to establish that his false citizenship claim did not completely insulate him from inquiry, would make no difference because whatever inspection may have incidentally occurred, there was still not inspection as an alien.

The Board cites as its strongest authority Reid v. INS, 420 U.S. 619, 95 S. Ct. 1164.

2. Waiver of deportation under Section 241(f) is absolutely precluded since deportation is not sought for excludability on fraud grounds. Reid cited supra.

3. The Service will refuse to grant administrative grace in the form of voluntary departure in lieu of deportation because the adverse factors of (1) a deliberately planned fraudulent entry, (2) high probability of committing adultery and

(3) failure in August, 1974 to pay 1973 income tax due April 15, 1974 outweigh the equitable factors of (a) two previous legal entries, (b) 15 years residence in the United States, (c) hardship to citizen immediate relatives resulting from his deportation.

Facts Relevant to the Issues Presented for Review

The petitioner, who is a native and citizen of Trinidad, is the spouse of a United States citizen and the parent of two United States citizen children. He has resided continuously in the United States for 16 years except for a departure from the United States in 1960 and a short trip to Canada in August 1974.

The petitioner's illegal entry into the United States on August 5, 1974 was the last of three entries made by him into the United States.

On two earlier occasions in 1960 and 1961 respectively he had entered the United States legally as a non-immigrant and had on those occasions submitted himself as an alien for inspection.

On August 4, 1974, at about 11:00 p.m., the petitioner, an alien, along with three United States citizen passengers, had attempted entry into the United States by driving his Mercedes Benz car to the Rainbow Bridge, and

attempting to use his New York State driver's license and car registration as evidence of his residence in the United States. (See affidavit of petitioner and Patsy Gully.)

Failing to accomplish entry in this way, the petitioner returned to a hotel in Niagara Falls, Canada.

On the following morning of August 5, 1974 the petitioner left his Mercedes Benz car with his three friends at the hotel and alone returned to the Rainbow Bridge in a Canadian taxicab and presented a United States birth certificate to the inspecting Admission Officer in the name of Wesley Cariel Oliver, claiming that he was Wesley Cariel Oliver. (See affidits of petitioner and Patsy Gully.)

The petitioner's claims were not readily accepted after his failure to satisfactorily explain lack of luggage after a three-day trip in Canada.(See affidavit of petitioner.)

The taxi driver was instructed by the inspecting Admission Officer to temporarily discharge the passenger and await his return to the taxicab so that a secondary and more thorough examination of his claim of citizenship could be undertaken. (See affidavit of petitioner.)

An exhaustive inquiry took place during which the Immigration Service suspected that he was an alien using a false birth certificate and for reasons best known to the Service, as subsequently shown, also later suspected that he was somehow connected with the attempted entry of two females, Jacquetta Barron and Patsy Gully, who were then

attempting entry in a taxicab with the petitioner's driver's license and automobile registration found on the person of one of the females. (See complaint of Border Patrol Agent, Affidavits of Petitioner and Patsy Gully, August 14, 1975.)

A decision to keep the petitioner under surveillance was formulated by the Service Officers and in pursuance of this surveillance, he was permitted to continue to a stated destination of the bus depot about 500 yards away.

The bus depot was, at that time, on the other side of a building which could not be seen directly from the inspection station at the bridge and the petitioner could only have been kept under constant surveillance after entry, as is stated by the Border Patrol Agent, (see Affidavits), if the decision to keep in under surveillance had been formulated at the time of his entry.

After the female passengers had reappeared at the border with the Mercedes Benz car, and after a thorough search was made of the car by the officers at the border, the surveillance was terminated and the petitioner was arrested and put under proceedings for having entered without inspection as an alien. (See Border Patrol Agent's Complaint, Affidavits of Petitioner and Patsy Gully.)

Summary of Argument

I.

As to Sustainability of the Deportation Charge

The earlier conceding of deportability, by the petitioner without counsel, involved the drawing of conclusions of law that were very complex, conclusions that were guardedly drawn even by the last Circuit Court to confront this issue (Heung v. INS, 380 F.2d. 236(1st Cir. 1967)), before petitioner drew his own conclusions and conceded deportability.

The details of the petitioner's hour-long scrutiny before entry and the highly probable conclusion that his alienage was suspected even before entry, were facts of such material significance, that his earlier and bare admissions were no longer clear, convincing and unequivocal evidence of deportability for entry without inspection.

A reopened hearing would have afforded petitioner the only opportunity available to affirmatively establish that he was considered an alien during inspection, despite the fact that he had not submitted himself as an alien for inspection.

The criminal complaint of the Border Patrol Agent, complemented by the Affidavits of the petitioner and Patsy Gully were sufficient new information to justify reopening for the purpose of affirmatively establishing that the functional equivalent of inspection as an alien had occurred,

even though the petitioner had not submitted himself as an alien.

II.

As to Voluntary Departure

There was no rational basis warranting departure from the general standard policy of recognizing that long-term residents in the United States, even though illegal residents, who have extremely close family ties such as a citizen wife and citizen children, are to be presumptively considered as possessing equitable factors for discretionary consideration; and that withholding of such discretionary consideration would occur only if the totality of the adverse factors would outweigh the totality of the favorable factors.

III.

As to Statutory Waiver of Deportability under Section 241(f)

This form of relief, if granted petitioner, would only waive established deportability. Such waiver would create a status of non-deportation, without simultaneously granting permanent residence, since the reach of the statute is limited to the waiver of the type of deportation specified in its terms.

Petitioner recognizes that, as required by Reid v. INS (420 U.S., 619, 95 S.Ct. 1164) this waiver is available only for a specified ground of deportability, at entry, under Section 241(a)(1), which would arise only from excludability, under Section 212(a)(19), for fraud.

Petitioner contends, however, that even though he has been charged with deportability under an independent ground of Section 241(a)(2), such independent ground is not a self-sufficient one. (See Gordon & Rosenfeld Vol. 1, 1975 Supplement Page 4-40, in appraising the scope of the uncertain full impact of Reid v. INS.)

Petitioner contends that his differing fact pattern from Reid makes the entry without inspection charge, under Section 241(a)(2), only the glove around the clenched fist in the knockout punch of deportation.

The actual clenched fist in that "glove" is the petitioner's deportability at entry under Section 241(a)(1) for excludability, under Section 212(a)(19), for fraud.

The petitioner also claims that waiver of deportation would remove the only ground of ineligibility for the immigrant visa which he is now pursuing.

Argument

As to Sustainability of Deportation Charge

THE FACT PATTERN OF PETITIONER'S ENTRY CASTS SERIOUS DOUBTS AS TO THE APPLICABILITY OF THE IMPORTANT RATIO DECIDENDI OF THE RULE OF LAW DECIDING THAT AN ALIEN WHO ENTERS ON A FALSE CITIZENSHIP CLAIM IS DEPORTABLE FOR ENTRY WITHOUT INSPECTION UNDER SECTION 241(a)(2) I & N ACT.

Petitioner respectfully submits that on the question of deportability for entry without inspection, based on a false citizenship claim, Reid v. INS supra has enunciated the following rule of law by agreeing with the various Courts of Appeals: (Reid v. INS supra at Page 1168)

> ".....Contrary to the suggestion in Judge Coffin's dissent, we need not, and do not, decide that whenever an inspection is not pursued because of a misrepresentation there has been no inspection. What we do hold is that there must at least be a submission or presentation for the inspection required by the statute, and that for substantive reasons heretofore given section 1251 "(a) Any alien * * * who * * * (2) entered the United States without inspection * * * " required an inspection as an alien. This inspection was never had in any degree. A man who, when asked about his health, falsely denies any past illnesses, as a result of which no further examination is made, has, in a sense, had a health inspection. A man who successfully claims to be a citizen has not been inspected as an alien at all. We hold, accordingly, that where there was a false claim of citizenship, made and accepted, there has been no inspection under this section...."
>
> (Excerpt from Goon Mee Heung v. INS, 380 F.2d 236

(1967) which is incorporated into Reid by reference in Reid.)

However, in reaching its own decision to agree with the various Courts of Appeals, the Reid Court specifically stated that it was doing so by subscribing to the reasoning of the Heung Court: (Emphasis supplied)

> ".....The issue before us, then, turns upon whether petitioners, who accomplished their entry into the United States by falsely asserting that they were citizens of this country, can be held to have "entered the United States without inspection." Obviously not every misrepresentation on the part of an alien making an entry into the United States can be said to amount to an entry without inspection. But the courts of appeals have held that an alien who accomplishes entry into this country by making a willfully false representation that he is a United States citizen may be charged with entry without inspection. Ex parte Saadi, 26 F. 2d 458 (CA9 1928), cert. denied, 278 U.S. 616: Volpe v. Smith, 62 F. 2d 808 (CA7), aff'd on other grounds, 289 U.S. 422, 424 (1933); Huie v. INS, 348 F. 2d 1014 (CA9) 1965). We agree with these holdings, and conclude that an alien making an entry into this country who falsely represents himself to be a citizen would not only be excludable under Section 212(a)(19) if he were detected at the time of his entry, but has also so significantly frustrated the process for inspecting incoming aliens that he is also deportable as one who has "entered the United States without inspection." <u>In reaching this conclusion we subscribe to the reasoning of</u> Judge Aldrich, writing for the Court of Appeals for the First Circuit in Goon Nee Heung v. INS, 380 F.2d 236, 237 (CA1 1967), cert. denied, 389 U.S. 975 (1968):
>
> " Whatever the effect other misrepresentations may arguably have on an alien's being legally considered to have been inspected upon entering the country, we do not now consider: we are

> here concerned solely with an entry under a fraudulent claim of citizenship. Aliens who enter as citizens, rather than as aliens, are treated substantially differently by immigration authorities. The examination to which citizens are subjected is likely to be considerably more perfunctory than that accorded aliens. Gordon & Rosenfeld, Immigration Law and Procedure Section 316d(1969). Also, aliens are required to fill out alien registration forms, copies of which are retained by the immigration authorities. 8 C.F.R. Section 235.4, 264.1; 8 U.S.C. Section 1201(b), 1301-1306. Fingerprinting is required for most aliens. 8 U.S.C. Section 1201(b), 1301-1302. The net effect, therefore, of a person's entering the country as an admitted alien is that the immigration authorities, in addition to making a closer examination of his right to enter in the first place, require and obtain information and a variety of records that enable them to keep track of the alien after his entry. Since none of these requirements is applicable to citizens, an alien who enters by claiming to be a citizen has effectively put himself in a quite different position from other admitted aliens, one more comparable to that of a person who slips over the border and who has, therefore, clearly not been inspected."

The Supreme Court did not only state what the law was, but also why it was so.

The rule of law that an alien who accomplishes entry by making a willfully false representative that he is a United States citizen is deportable for entry without inspection, was decided that way BECAUSE the perfunctory inspection as a citizen cannot, and does not, afford the full opportunity to make a closer examination of his right to enter by thwarting meaningful inquiry and significantly frustrated the process

for inspecting incoming aliens.

Petitioner contends that the above underlying principle was necessary to the question of law decided by "Reid" and had always been necessary to each similar decision of the various Courts of Appeals. (Ex parte Saadi, supra; Volpe v. Smith, supra; Huie v. INS, supra; Heung v. INS, supra.)

This underlying principle or ratio decidendi was actually born after the attack against the old practice of charging that all false statements accepted at entry, including false citizenship and materially false details as to admitted alienage, inhibited meaningful inspection at entry and therefore constituted deportability for entry without inspection. (See Matter of C-V 1 I&N 385 for its discussion of the pattern of development of the relevant part of Section 19 of the 1917 Act, which was the forerunner of Section 241(a)(2).

It is believed that the total dependence of the rule of law upon its ratio decidendi is illustrated by the rule of law deemed applicable to the inspection status of an alien who enters the United States on an unintentionally false claim of citizenship.

Such a person is considered not to have been inspected as an alien if applying for a benefit for which inspection as an alien is a pre-requisite.

This same lack of inspection as an alien is not considered a deportable offense, as having entered without inspection. (See Zimmerman v. Lehman, 339F.2d 943 (7th Cir. 1965) and Matter of Edwards 10 I&N 506)

If there is some consistency of statutory construction in this approach, it would appear that the lack of inspection as an alien is not alone the basis for deportability for entry without inspection.

For deportability to exist upon lack of inspection as an alien such lack of inspection must also produce a significant frustration of the inspection process for incoming aliens.

Petitioner submits that the conclusion is inescapable that the reasons for the decision or its ratio **decidendi** were so significant as to constitute a part of the decision and a part of the rule of law contained therein.

(For the general proposition that ratio decidendi could constitute part of the Rule of Law see Moore Federal Practice Vol. 1B O. 402 Page 114-115 - Footnote 10.)

Therefore, the Reids' deportability was sustained because the facts which they admitted at their deportation hearing had established:

1. Lack of inspection as an alien.
2. Thwarting of meaningful inquiry by failure to admit alienage at time of inspection.

Petitioner concedes that his bare admissions at the deportation hearing were clear, convincing and unequivocal evidence of deportability on the rule of law, enunciated by Reid v. INS, that lack of inspection as an alien renders an alien deportable for entry without inspection.

However, petitioner holds that rule of law to include within i terms the ratio decidendi concerning the thwarting of meaningful inquiry and the significant frustration of the inspection process for aliens.

While his bare admissions, that he entered without presenting himself as an alien, would be sufficient to satisfy even the ratio decidendi, the additional evidence of his continuous surveillance were unlike the required circumstances in the ratio decidendi and re-opening to establish the accuracy of the details of petitioner's exhaustive pre-entry examination and continuous surveillance would have made a difference with respect to the ratio decidendi.

Therefore the final rejection by the Board of Immigration Appeals, dated September 18, 1975, of petitioner's request to re-open proceedings to contest deportability, was an error as a matter of law. That rejection asserted that re-opening would serve no useful purpose since evidence of any surveillance of the petitioner would not change the fact that entry was without inspection as an alien and, under

Reid v. INS, deportable for entry without inspection. (See BIA Decision dated 9/18/75.)

The Board, by denying a new hearing, did not provide a fair opportunity, possible only from a hearing, to have a determination on the facts requiring adjudication, facts which involved a matter of the direct impact of deportation. (See generally as to need for a hearing, Gart v. Cole 263 F.2d. 244 2nd Circ., cert. denied 359 U.S. 978, 79 S. Ct. 898, 3L.ED, 2d. 929 (1959)).

Petitioner asserts that at a re-opened hearing he could have established that even though he had not submitted himself as an alien for inspection, the result was not the thwarting of meaningful inquiry or the significant frustration of the inspection process.

The re-opened hearing would have established that it was highly probable that his alienage was suspected during his hour-long interrogation prior to entry.

Therefore even though he did not present himself as an alien at entry, his inspection as a citizen could nave been <u>as an alien</u> from either one of the following points of view:

(1) his suspected alienage during inspection of his citizenship claim; or

(2) the thoroughness of the inspection was the functional equivalent of that given an alien and therefore <u>as</u> an alien, by giving to the

word "as" one of its meanings, namely, "similar to" or "equivalent to".

(See Black's Law Dictionary definition of word "as", arising from State Court interpretation; and the persuasive value to Federal Court, of State Court interpretation - Moore's Federal Practice Vol. 1B-, 0-402(1)-Page 65)

The petitioner had felt that the Border Patrol Agent's Affidavit was sufficient and more than mere prima facie evidence of the existence of significant questions surrounding his entry, questions that would have been material to whether his failure to submit himself as an alien resulted in thwarting of meaningful inquiry and significantly frustrated the inspection process for incoming aliens. (See petitioner's Supplemental Memorandum of 4/8/75 Pages 12 through 15)

The Board, in its decision July 28, 1975, did not address itself to this issue raised by petitioner, whereupon petitioner requested reconsideration of this issue. Such reconsideration was denied.

Petitioner recognizes that without re-opening there was a lack of hard-core evidence to establish his factual contentions that a full-blown alien-style inspection occurred and which would support his legal contention that his deportability has not been established according to the ratio decidendi of the Reid v. INS decision which petitioner

claims constitutes part of the rule of law decided by Reid v. INS.

Petitioner believes that in the alternative such hard-core evidence is in the form of the arresting officer's affidavit or statement which should have been a part of the record of the Agency proceedings but which petitioner discovered on or about December 29, 1975 was not included in the record.

This material was never introduced as an exhibit at the hearing but was used by the trial attorney during cross examination of the petitioner (unrepresented by counsel) and was referred to by the trial attorney during such cross examination. (See Page 9 of the Trial Transcript.)

Petitioner believes that pursuant to 5 U.S.C. 556 (e) such statement is properly part of the record of proceedings, not on a claim that it should have been an exhibit, but that it constitutes a document "filed" in the proceedings, other than an exhibit, because of its use during such proceedings and because it was directly referred to by the trial attorney, even though in cross examination, in an effort to discredit petitioner.

Petitioner had, pursuant to F.R.A.P. #16, attempted to stipulate the supplementing of the record of proceedings with respondent's counsel and, as of the date of submission of this brief, has been unable to secure such stipulation without utilizing court process for obtaining of the record.

Petitioner will submit this supplementing of the

of the record of proceedings upon obtaining same through motion if not obtained pursuant to stipulation with respondent's attorney.

As to Voluntary Departure

There were three grounds for denying voluntary departure. (See Appendix 20A.)

It is conceded that even the non-willfull failure to file one income tax return for one given year is not to be condoned.

It is conceded that committing adultery is not to be condoned.

It is also conceded that the willfullness of a deportable act is a factor for considering discretionary relief from deportation.

However, it must be noted that the petitioner had indicated, at the time of the hearing, that his failure by August 1974 to file the tax return due in April 1974, was not related to an attempt to avoid or evade the filing of the return for that taxable year in question. (See transcript of hearing page 16.)

It must also be noted that there was no proof of actual adultery but only a finding that it was "highly probable" that adultery had occurred. (See decision of Board of Immigration Appeals dated July 28, 1975.)

The willfullness of the alleged entry without

inspection should not be given so much weight as had been given to it by the Board of Immigration Appeals in considering voluntary departure. (See Decision of July 28, 1975)

As had been established in Zimmerman v.Lehman and Matter of Edwards supra, willfullness of a false citizenship claim at entry is an absolute prerequisite to sustaining deportability for entry without inspection under Section 241(a)(2).

However, deportability for entry without inspection is not one of the deportable classes ineligible for voluntary departure. (The deportable classes, after deportability has been established in hearing, not eligible for voluntary departure are listed in Section 244(e) of the I&N Act.)

Since willfullness is a significant element of deportability under this charge and voluntary departure is not statutorily unavailable under this charge, it is doubtful that there is a rational basis for utilizing "willfullness" as a ground for denying voluntary departure.

Petitioner believes that the combined factors of his long United States residence, close family ties, and the hardship that would ensue to himself and minor United States citizen children and United States citizen wife, if he is deported, should be given the normal favorable con-

sideration expressed in official standard policy of the Immigration Service. (See

Petitioner believes that the total weight of the three adverse factors mentioned above should not be given precedence over the equitable factors and that voluntary departure in lieu of deportation should be granted.

As to Statutory Waiver of Deportability Under Section 241(f)

Petitioner recognizes that, as required by Reid v. INS (420 U.S.,619, 95 S.Ct. 1164), this waiver is available only for a specified ground of deportability, at entry, under Section 241(a)(1), which would arise only from excludability, under Section 212(a)(19), for fraud.

Petitioner contends, however, that even though he has been charged with deportability under an independent ground of Section 241(a)(2), such independent ground is not a self-sufficient one. (See Gordon & Rosenfeld Vol.1, 1975 Supplement Page 4-40, in appraising the scope of the uncertain full impact of Reid v. INS.)

Petitioner submits that his Section 241(f) argument is dependent upon the sustainability of the charge and is not precluded by the fact that he is not charged with excludability for fraud.

Petitioner believes that the Immigration Service cannot sustain his deportability under the Section 241(a)(2)

charge except for some reliance upon the fact of his excludability at entry.

Petitioner wishes to point out that the Immigration Service had charged him criminally under 8 U.S.C. Section 1325,(3) for entry by fraud and not Sub-Section(2) for entry without inspection. (See Border Patrol Agent's complaint.)

As stated before, petitioner's argument as to the sustainability of the charge against him is based on his claim that the indispensable ratio decidendi of the Reid v. INS decision requires that lack of inspection as an alien as well as proof that such lack also significantly frustrated the inspection process for aliens.

The deportability of the Reids was established quite independently of their excludability for fraud because their admissions alone had proved no inspection as an alien as well as perversion of the inspection process for aliens.

However, with respect to the petitioner, in order to determine whether there was a perversion of the inspection process for aliens, the excludability of the alien must be looked into and assessed and such assessment cannot avoid considering the fraud which he perpetrated.

Petitioner cannot predict the extent to which the assessment of his non-perfunctory inspection will depend upon his excludability for fraud and submits that this is a

fact determination to be made in the forum of an open hearing.

Conclusion

WHEREFORE, petitioner respectfully prays for an Order:

(a) Declaring that clear, convincing and unequivocal evidence of deportability does not exist pursuant to the ratio decidendi portion of the decision in Reid v. INS; and terminating the deportation proceeding; or

(b) Remanding the proceedings to the Board of Immigration Appeals for a redetermination of whether the evidence of his alien-style inspection could establish deportability pursuant to the requirement, as claimed, that there be existence of a significant frustration of the inspection process for aliens.

(c) Remanding the proceedings for a determination on the question of whether his deportability can be established independently of excludability for fraud and whether, in the circumstances, Section 241(f) benefits are available; or

(d) Declaring that voluntary departure in lieu of deportation should be granted as a rational exercise of administrative discretion.

Respectfully submitted

LEO E. YPSILANTI
Attorney for Petitioner

Dated: February 2, 1976

APPENDIX

Table of Contents

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

No.

ORDER TO SHOW CAUSE, NOTICE OF HEARING, AND WARRANT FOR ARREST OF ALIEN

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA:

File No. A20 374 726

In the Matter of MILTON EVEREST MITCHELL,

Respondent.

1851 Central Park Avenue, Yonkers, New York, 10710
Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Trinidad and a citizen of Trinidad;
3. You entered the United States at Niagara Falls, New York (Rainbow Bridge) on or about August 5, 1974 (Date).
4. You were then admitted as a citizen of the United States;
5. You were not then a citizen of the United States;
6. You did not present yourself for inspection as an alien by a United States Immigration Officer;

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241 (a) (2) of the Immigration and Nationality Act, in that you entered the United States without inspection.

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at the U.S. Courthouse, 68 Court Street, Buffalo, New York

on Tuesday, August 6, 1974 at 10:00 Am, and show cause why you should not be deported from the United States on the charge(s) set forth above.

WARRANT FOR ARREST OF ALIEN

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I have commanded that you be taken into custody for proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations, and this order shall serve as a warrant to any Immigration Officer to take you into custody. The conditions for your detention or release are set on the reverse hereof.

Dated: August 5, 1974
4:00PM

Benedict J. Ferro
(signature and title of issuing officer)

Benedict J. Ferro, Acting District Director, Buffalo, New York
(city and State)

Form I-221S (12-1-73)

(over)

1A

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A20 376 726 - Buffalo, New York August 6, 1974

In the Matter of)

MILTON EVEREST MITCHELL)
) IN DEPORTATION PROCEEDINGS

Respondent)

CHARGES: I & N Act - Section 241(a)(2) - Entered without inspection.

APPLICATION: Voluntary Departure

IN BEHALF OF RESPONDENT:

Leo B. Ypsilanti, Esquire
225 Broadway
New York, New York 10007

IN BEHALF OF SERVICE:

Gordon W. Sachs
Trial Attorney
Buffalo, New York

ORAL DECISION OF THE IMMIGRATION JUDGE AUG. 6, 1974

The respondent is a 33-year-old married male alien, a native and citizen of Trinidad who last entered the United States at Niagara Falls, New York on August 5, 1974 at which time he presented a birth certificate relating to a Mr. Oliver who had been born in the United States and claimed to be a citizen of the United States. He was in fact admitted as a citizen thereof and thereby avoided inspection as an alien by United States Immigration Officers. He was subsequently apprehended and placed under proceedings. It is clear that the charge contained in the Order to Show Cause is sustained and the respondent is deportable as charged.

The respondent applied for the privilege of voluntary departure from the United States in lieu of deportation. He has testified that he has never been arrested or had any difficulties with the police. However, the

record indicates that the respondent obtained the birth certificate showing birth in the United States from Oliver approximately three months ago apparently with an idea of using it as an identity paper if necessary and certainly with the idea of using it on his trip to Canada. He went to Canada with a male friend and two female friends and he stated the reason he did not go with his wife was because they had an argument shortly before. The respondent drove to Canada in his 1973 Mercedes car which he states is worth approximately $10,000 on which he has only one year's payments left. They rented two rooms at a hotel in Toronto and he states that the two girls who accompanied him were in and out of those rooms but had no separate quarters. The alleged purpose of the trip to Toronto was to see a Trinidad festival which was taking place in Canada.

Respondent is married to a citizen of the United States, has one child born in this country who is eight years of age. He claims that last year he earned $18,000 as a house painter but also admits that he paid no federal income tax last year and although this matter was mentioned and discussed with an attorney, he had still filed no income tax for 1973.

Upon consideration of all the facts and records I find the respondent does not warrant the relief he has requested as a matter of administrative discretion. The record shows that he cleanly planned for this trip to Canada. He planned his fraudulent return to the United States with a birth certificate which did not belong to him. It is highly probable that he committed adultery on his last trip to Toronto and that he has not paid his income tax for 1973. When this is coupled with the possession of a car worth $10,000, there is certainly room for doubt as to what activities the respondent is

engaged in. In any event, the circumstances of this case do not warrant the grant of voluntary departure in the matter of administrative discretion. I wish to note that the respondent has had an application for an immigrant visa under processing by an attorney in New York but had failed to take any action on it, claiming that he did not have sufficient money with which to pursue it. He has indicated that if he was deported he wishes to be sent to Trinidad.

ORDER: IT IS ORDERED that the respondent be deported from the United States to Trinidad on the charge contained in the Order to Show Cause.

IRA FIELDSTEEL
Immigration Judge

true that you are not a citizen of the United States?

A. Yes, sir.

Q. Is it true that you are a native and citizen of Trinidad?

A. Yes, sir.

Q. Is it true that you last entered the United States at Niagara Falls, New York at the Rainbow Bridge yesterday, August 5, 1974?

A. Yes, sir.

Q. And is it true that the officers admitted you as a citizen of the United States?

A. Yes, sir.

Q. But you are not a citizen of the United States?

A. Yes, sir.

Q. Now by entering as a citizen you avoided inspection as an alien and you are technically subject to deportation. Do you understand that?

A. Yes, sir.

Q. Now, you want the opportunity of leaving the United States voluntarily at your own expense instead of being deported?

A. Yes, yes.

Q. Now, this lady here is your wife?

A. Yes, sir.

Q. Come around here madam. What is your name?

RESPONDENT'S WIFE:

A. Corvelia Ann Mitchell.

Q. Corvelia Ann Mitchell?

A. Yes.

Q. Were you born in the United States?

Q Identification?

A Yes.

Q How did you get it from him? Did you ask him for it?

A Yes.

Q Did you say anything else to him?

A No, sir.

Q Did you pay him anything?

A No, sir.

Q Well, why did he give it to you?

A Because he is a friend of mine.

Q Did you tell the officer that this man was dead?

A Yes, sir.

Q Did you tell him that you paid $200.

A No.

Q Did somebody else?

A No, sir.

Q The officer says here that that's the statement that was made. You never said anything like that?

A No.

Q Did Mr. Oliver normally give his friends his birth certificate?

A No, no, sir.

Q You don't know this or he doesn't.

A No, sir, I don't know that. He died about two months ago, first week in July.

Q Are you telling me that he is in fact dead now?

A Yes.

Q Why is it that your wife, who's sitting next to you did not go, but Pat went? Can you explain that?

A Yes, yes.

Q Go ahead, explain it. You say you cannot explain it or what?

A Yes, I can explain it.

Q Well, please do.

A Well, you see, in a rage, in a fit of anger we had an argument the night before, the day before we had a little disturbance as man and wife do.

IMMIGRATION JUDGE TO RESPONDENT: Would you explain something a little more important, Mr. Mitchell, how is it that a man who is, who has a family to support, who claims to be earning only $15,000 a year, who couldn't pay his lawyer so he could get permanent residence in the United States, has a Mercedes, a new Mercedes? Can you explain that to me?

A Yes, sir. Yes, sir. Mercedes, Mercedes, that was like a dream like, you understand?

Q I can understand it as a dream but I, I'm trying to find out where the money came from. That's what I'm trying to find out, where the money came from?

A From ... from...you remember years before of work and savings.

Q Have you or your wife ever been on relief, on welfare?

A No, sir.

IMMIGRATION JUDGE TO RESPONDENT'S WIFE:

How about you, mam, have you ever been on welfare?

A No.

TRIAL ATTORNEY TO RESPONDENT: You said to us that you had $15,000

approximately income last year.

A Yes.

Q Did you declare a federal income tax return last year?

A Last year I didn't file a federal income tax. My lawyer, James B. Dicster, who files federal fa income tax for me, he didn't file it, he asked for extension. I had to go to Detroit to see him. I filed the year before.

Q You mean as of August 6, today, you have not filed an income tax return for 1973? Is that right?

A No sir, no sir, no sir.

Q But you live in Yonkers, why do you have a man in Detroit filing your income tax return for you?

A Because it's the lawyer I was introduced to me.

IMMIGRATION JUDGE TO RESPONDENT: What did your lawyer tell you about the filing of your income tax? What was his advice to you?

A He told me I had to file.

Q Why didn't you file? Instead of buying a Mercedes, why didn't you pay your income tax? Or was that too much of a dream?

A No, sir.

IMMIGRATION JUDGE: All right, anything further, Mr. Sachs?

TRIAL ATTORNEY: No, sir, I have nothing.

IMMIGRATION JUDGE TO RESPONDENT: If you have to be deported, Mr. Mitchell, to what country do you wish to be sent?

A Trinidad.

Q All right, I'll now state my decision orally for the record.

NOTE: At this point in the proceedings, in the

A F F I D A V I T

STATE OF NEW YORK)
) ss
COUNTY OF NEW YORK)

MARION MITCHELL, being duly sworn, deposes and says:

That I am making this affidavit to provide additional information, not given at my Deportation Hearing, concerning the details of my arrival into the United States on August 5, 1974.

That at the time of my Deportation Hearing on August 6, 1974, I had not provided these details, but had only answered in the affirmative to certain questions put to me by the Immigration Judge.

That such answers constituted an admission on my part that I had entered the United States on an intentionally false claim of United States citizenship, thereby avoiding inspection as an alien and that I was technically subject to deportation. (See page 2 - Transcript of Testimony lines 1 through 15)

That at that time I was not represented by counsel and gave "yes" answers to questions that then seemed to me to involve only straight questions of fact, not realizing that answers to these questions also required me to draw conclusions of law that were very complex.

That the following is an excerpt from my testimony from which my deportability was considered by the Immigration Judge to have been established:

"....Q. Is it true that you are not a citizen of the United States?
A. Yes, sir.
Q. Is it true that you are a native and citizen of Trinidad?

A. Yes, sir.
Q. Is it true that you last entered the United States at Niagara Falls, New York at the Rainbow Bridge yesterday, August 5, 1974?
A. Yes, sir.
Q. And is it true that the officers admitted you as a citizen of the United States?
A. Yes, sir.
Q. But you are not a citizen of the United States?
A. Yes, sir.
Q. That by entering as a citizen you avoided inspection as an alien and you are technically subject to deportation. Do you understand that?
A. Yes, sir.
Q. Now, you want the opportunity of leaving the United States voluntarily at your own expense instead of being deported?
A. Yes, yes. ******

That because of my ill-advised decision to proceed without counsel, and because of my unawareness of the legal conclusions inherent in my answers, I could not, at that time, present evidence of my continued surveillance by the Immigration Officer and Border Patrol Agent.

That it thereafter appeared that the details concerning my surveillance by the Immigration Service might have raised a substantial question as to whether the falsity of my citizenship claim and identity was known to the officer at the time of my entry; and further, whether, since I had appeared at the border in a Canadian taxicab without luggage, my entry was not "permitted" as part of an investigative procedure aimed at determining whose my trail might lead the Immigration Service.

That the details not provided at my Deportation Hearing are as follows:

I had first attempted to enter the United States on August 4, 1974 at about 11:30 p.m.

That at that time myself and three other passengers had driven up to the border inspection point in my automobile, the Mercedes Benz referred to by the Immigration Judge in his decision.

That at that time I had presented my New York State Driver's License and car registration as evidence of my identity and also claiming to be a resident of the United States.

That my claims were rejected and I, together with the other passengers, drove back to a hotel on the Canadian side of the border.

That several hours later, between 7:00 and 8:00 am on the morning of August 5, 1974, I did reappear at the same check point in a Canadian taxicab after having left my car parked in the hotel area.

That upon applying for admission to the United States I presented a birth certificate of Wesley Oliver, a citizen of the United States, claiming that I was Wesley Oliver, a citizen of the United States.

That the Immigration Officer asked me how long I had been in Canada, and after informing him that I had been in Canada for two or three days, he asked me for my luggage and I told him that I had none.

That the Immigration Officer did not accept my claim and informed the cab driver to pull over and wait on the side.

That I was thereafter requested to get out of the Canadian taxicab and was taken into the Immigration Office at the check point for questioning.

That the Immigration Officer examined the photostatic

copy of the birth certificate which I had, asked me several questions concerning my father's name, my mother's name, date and place of birth, number of children of my mother, number of children of my father, and inquired as to how I would actually get back into the United States since the Canadian cab would not drive me all the way to New York.

That the Immigration Officer also questioned me as to why I had come to the border in a taxicab and not on a bus destined for New York or a private automobile destined for New York if my purpose in re-entering the United States was to return to my home in New York.

That I gave the Immigration Officer very conflicting answers to this line of questioning, and having discharged the Canadian taxicab that had brought me to the border, it was suggested to me that I could take another cab, pointed out to me by the Immigration Officer, and that I could either go to the bus depot or possibly to the airport to obtain passage back to New York.

That after getting into the cab pointed out to me by the Immigration Officer, that cab driver proceeded to question me at length in a manner quite different to the normal questions put to a passenger by even a friendly taxicab driver.

That because of the unusual questions put to me, I asked the taxi driver to let me off at the bus depot at which point I again saw the same Immigration Officer who had been interviewing and interrogating me all along.

That I remained in the vicinity of the bus depot for an extended period of time under the constant observation of the

Immigration Officers while I was awaiting the arrival of my car with the other passengers who had attempted to cross over with me the night before.

That I subsequently discovered that while I was waiting for the car, and under the constant observation of the Immigration Officers, that the passengers in the car were being interrogated in a manner that suggested that the Immigration Officers were of the opinion that the car had probably contained concealed contraband, and, in fact, certain parts of the car were removed during the course of the search of said car.

That my driver's license in my name had been found on the person of one of the passengers, and I was subsequently informed that the Immigration Officers had indicated to the passengers of the car that they knew that I had come in earlier to rendezvous with them, and that they had, in fact, described me including my form of dress to the passengers.

That it later appeared that my appearance at the border in the Canadian tunnel without any luggage had prompted the suspicion of the Immigration Officers at the time of my inspection and entry, and from the line of questioning, realized that I was not directly on my way to New York, and that I would be remaining in the area, and that they had probably permitted me to enter as a way of later determining the purpose for which I would be remaining within the inspection area as I had indicated to them.

That during the course of the preparation and argument of my case, my attorneys had become aware of the above material information which was not developed at my Deportation Hearing and

had requested, in a supplemental brief submitted to the Board of Immigration Appeals, the opportunity to present this evidence in an effort to question the validity of the Order of Deportation entered against me.

That at the time of such request, my attorneys had also requested the opportunity to present at a reopened hearing the question of whether or not any deportability established against me would not, on the basis of the details of my surveillance, require a necessary finding of my excludability at entry for fraud.

That my attorneys had presented for consideration to the Board the Border Patrol Agent's affidavit outlining his continued surveillance of me, and had intended to "fill in the gaps" in the Border Patrol Agent's testimony by having me testify at a reopened hearing requested by my attorneys.

That I have been reliably informed, and I do verily believe, that a reopened hearing would provide me with a fair opportunity to withdraw my conceding of deportability on the charge lodged against me; and would also provide me with a fair opportunity to establish whether or not any deportability found sustained with respect to myself was or was not sustained quite independently of my excludability at the time of entry for fraud.

That I have been reliably informed, and do verily believe, that an opportunity to develop evidence concerning the details of my entry and surveillance would have a material effect on whether or not I am deportable as charged by clear, convincing and unequivocal evidence; and further, whether or not there exists, in sustaining my deportability, the important element of

excludability for fraud.

That whether or not my deportability is sustainable with or without the important element of excludability for fraud is an important question germane to my eligibility for the benefits of Section 241(f) of the Act.

That even though the main thrust of the Supreme Court's decision in KNED VS. KNS 95S.Ct. 1161(1975) precludes Section 241(f) benefits from aliens charged with deportability under Section 241(a)(2) for having entered without inspection under a false claim of citizenship, this preclusion only exists if the sustaining of such deportability was quite independent of excludability for fraud.

That I respectfully request the opportunity, at a reopened hearing, to establish that my admissions alone at the time of original deportation hearing would not, in the light of the details concerning my continued surveillance from the time of entry, sustain my deportability by clear, convincing and unequivocal evidence.

That I respectfully request the opportunity, at a reopened hearing, to establish that even though my deportability may be considered as being sustained, that such sustaining cannot be established quite independently of my excludability for fraud.

That even if I should fail, at a reopened hearing, to have my deportation proceedings terminated on the grounds that entry without inspection has not been established, I verily believe that the holding of the Supreme Court in KNED VS. KNS affords me the

opportunity of raising the substantial question of whether my deportability is sustained quite independently of excludability for fraud.

What resolving of this question at a reopened hearing is germane to whether the special circumstances of my continued surveillance distinguish my entry without inspection on a false claim of citizenship from the entry without inspection of MMD; and, further, that this difference in with respect to the fact that my deportability on the charge similar to MMD, cannot be established quite independently of my excludability for fraud at the time of entry; and further, that upon such difference, I am not precluded from the benefits of Section 241(f).

Milton Mitchell
PETITIONER

Sworn to before me this
14th day of August, 1975

Notary Public

LEO E. [illegible]
Notary Public, State of New York
No. 60-7711500
Qualified in Westchester County
Commission Expires March 30, 1976

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

[redacted], being duly sworn, deposes and says:

That I was one of the three passengers in the Mercedes Benz automobile owned by [redacted] at the time that Mr. Mitchell had first applied for entry into the United States on August 4, 1974 at about 11:00 p.m.

That at the time of such application by Mr. Mitchell for entry into the United States, the Immigration Officer did not accept Mr. Mitchell's New York State Driver's License as evidence of his right to enter the United States.

That based upon this rejection by the Immigration Officer, Mr. Mitchell, together with the occupants of the car, had returned to a hotel on the Canadian side of the border and Mr. Mitchell had indicated to the other occupants of the car that he would resupply the following morning by taking a Canadian taxicab to the border.

That we would join him later with the car after he had contacted us and indicated that he had entered the United States.

That on or about 8:00 am of the morning of August 5, 1974, Mr. Mitchell had placed a telephone call to the hotel and the information was that we should come over and that he would give us instructions concerning bringing the car in.

That after myself and the other occupants of the car had first arrived in a Canadian taxicab and had obtained clearance to

enter the United States, we had informed the Immigration Officers that we were going back to bring in our car and had obtained permission to do so.

That after returning with the Mercedes Benz registered to Mr. Mitchell, the Immigration Officers surrounded the car, searching same and removing some of the upholstered parts indicating during their search that they were suspicious of the "goings on" involving the registered owner of the car, Milton Mitchell, with respect to whom they had said that they were aware that he had entered earlier on under an assumed identity and that he was still in the bus depot waiting for them to come over.

It would appear from the questioning and comments of the officers during the course of the search that lasted almost four hours, that the investigators were of the opinion that the "goings on" involving Mr. Mitchell's earlier entry under an assumed identity was actually part of some nefarious scheme that involved the entry of the Mercedes Benz into the United States; and that their primary interest was in the car and what part Mr. Mitchell and/or the occupants might have played in getting the car into the United States and contents of the car which they assumed to be contraband material.

That eventually the Immigration Officers were satisfied that the car did not contain any contraband material and shortly thereafter we were made to understand that Mr. Mitchell was arrested for having entered the United States on a false claim of citizenship.

Sworn to before me this
14th day of August, 1975.

Notary Public

Board of Immigration Appeals
Washington, D.C. 20530

Code K

File: A20 374 726 - Buffalo

JUL 28 1975

In re: MILTON EVEREST MITCHELL

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Leo E. Ypsilanti, Esquire
Edward Krein, Esquire
225 Broadway
New York, New York 10007

ON BEHALF OF I&N SERVICE: Anthony M. DeGaeto
Appellate Trial Attorney

ORAL ARGUMENT: March 19, 1975

CHARGES:

Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2)) - entered without inspection

APPLICATION: Reopening of proceedings

This case presents an appeal from a decision of the immigration judge on August 6, 1974, finding the respondent deportable and ordering his deportation to Trinidad, on the charge contained in the Order to Show Cause. He denied the respondent's application for the privilege of voluntary departure. Reopening of these proceedings will be denied and the appeal will be dismissed.

The respondent is a native and citizen of Trinidad, who entered the United States without inspection at Niagara Falls, New York, in August 1974, upon a false claim of United States citizenship. Deportability has been established by clear, convincing and unequivocal evidence.

The immigration judge, noting that the respondent obtained a birth certificate relating to a Mr. Oliver, approximately 3 months' prior to his reentry into the United States from Canada, with a male friend and two female friends, concluded that the respondent had deliberately planned his fraudulent return to this country. Noting also that it was "highly probable" that the respondent committed adultery on his trip to Toronto and also that he had failed to pay his income tax for the year of 1973, the immigration judge further concluded that the circumstances of this case do not warrant the grant of the privilege of voluntary departure as a matter of administrative discretion. On appeal, counsel challenges the immigration judge's decision on the ground that the respondent is saved from deportation by the provisions of section 241(f) of the Immigration and Nationality Act, as amended, and at the very least, as the husband and the father of United States citizens, he should be granted the privilege of voluntary departure.

We have carefully reviewed the record and find that due to the respondent's intentionally false claim to United States citizenship after his entry from Canada without inspection, he is not entitled to the benefits of section 241(f) of the Act. See Reid v. INS, ___U.S.___, 95 S.Ct. 1164 (1975). In the latter case, the Supreme Court held that section 241(f) does not benefit an alien who has entered the United States under a false claim to United States citizenship and was charged with deportability under section 241(a)(2) of the Act. See Matter of Joquin, Interim Decision ___(BIA June 11, 1975); Matter of Munguia, Interim Decision ___(BIA May 5, 1975). The respondent's deportation, therefore, is not precluded by section 241(f) of the Act. Accordingly, termination of these proceedings is not warranted even if, as alleged, the respondent went to Canada for the sole purpose of attending a Caribbean Festival in Toronto.

We further find, in view of the adverse factors set forth in the decision of the immigration judge, that his denial of the respondent's application for the privilege

of voluntary departure was correct. Accordingly, the motion to reopen these proceedings will be denied and the decision of the immigration judge will be affirmed.

ORDER: The appeal is dismissed.

FURTHER ORDER: The motion to reopen these proceedings is denied.

Lauri Wilson

Acting Chairman

United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530

SEP 18 1975

File: A20 374 726 - Buffalo

In re: MILTON EVEREST MITCHELL

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Leo E. Ypsilanti, Esq.
225 Broadway
New York, New York 10007

CHARGE:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2)) - Entered without inspection

APPLICATION: Motion to reconsider; stay of deportation

In a decision dated July 28, 1975, we dismissed the respondent's appeal from an immigration judge's order of deportation. The respondent has submitted a motion requesting that we reconsider our decision of July 28, 1975. The motion will be denied.

The respondent is a native and citizen of Trinidad who was admitted to the United States upon a wilful false claim to United States citizenship. He made an entry upon being admitted by the immigration officer at the border. Section 101(a)(13), Immigration and Nationality Act; see Matter of V-Q-, 9 I&N Dec. 78 (BIA 1960). The respondent was not then inspected as an alien. See generally Matter of Lam, 11 I&N Dec. 712 (BIA 1966). He was therefore correctly found deportable under section 241(a)(2) as an alien who had entered the United States without inspection. Reid v. INS, 420 U.S. 619, 624-25 (1975). Any surveillance of the respondent due to the suspicious nature of his activities does not alter the fact that he made an entry or that that entry was accomplished without inspection.

We thoroughly discussed the respondent's section 241 (f) claim in our decision of July 28, 1975. The existence of fraud is irrelevant because section 241(f) does not apply to a section 241(a)(2) "entry without inspection" charge. Reid v. INS, supra.

The respondent has requested a stay of deportation. That request will also be denied.

ORDER: The motion to reconsider and the request for a stay of deportation are denied.

Chairman

Form 3.0 St (Rev 12-1-53)

Complaint

United States District Court

FOR THE

WESTERN DISTRICT OF NEW YORK 74-0713 CR

UNITED STATES OF AMERICA	Magistrate's Docket No.
v	Case No.
MILTON EVEREST MITCHELL	COMPLAINT for VIOLATION of
	U.S.C. Title 8
	Section 1325

BEFORE Edmund F. Maxwell, U.S. Courthouse, Buffalo, New York,
Name of Magistrate — Address of Magistrate

The undersigned complainant being duly sworn states:

That on or about August 5, , 19 74, at Niagara Falls, New York in the Western District of New York

(1) Milton Everest Mitchell, a native and citizen of Trinidad and an alien to the United States

did (2) obtain entry to the United States by the willfully false representation that he was a citizen of the United States by presenting a New York birth certificate in the name of Cariel Wesley Oliver and did willfully conceal a material fact, in that, he was a citizen of Trinidad, an alien to the United States and had no immigration documents to enter, pass through or reside within the United States all of these acts having been committed at the Rainbow Bridge at Niagara Falls, New York to an immigration officer in violation of Title 8 U.S.C., section 1325.

And the complainant states that this complaint is based on the personal knowledge of deponent resulting from an investigation conducted by deponent during the normal tour of duty wherein your deponent examined a New York birth certificate in the name of Cariel Wesley Oliver which was presented by Milton Everest Mitchell to your deponent and Immigration Inspector Bernard L. Erickson on August 5, 1974 at the Rainbow Bridge at Niagara Falls, New York in support of his willful and false representation to being a citizen of the United States; and did further his false claim by making oral statements to your deponent that he was Cariel Wesley Oliver, born in New York City, a citizen of the United States and a native of New York City and did willfully and falsely conceal a material fact from your deponent, in that, he was in fact Milton Everest Mitchell, a citizen and native of Trinidad, an alien to the United States who did not possess immigration documents which would entitle him to enter, pass through or reside in the United States, all of which would have rendered him excludable from entry to the United States. (Continued on next page)

And the complainant further states that he believes that

Robert J. Stille and Bernard L. Erickson

are material witnesses in relation to this charge.

John T. Cipollini — Signature of Complainant.
Border Patrol Agent — Official Title.

Sworn to before me, and subscribed in my presence, ..., 19.....

United States Magistrate.

(1) Insert name of accused.
(2) Insert statement of the essential facts constituting the offense charged.

CONTINUATION OF COMPLAINT.....And the complainant states

Your deponent further states that Milton Everest Mitchell did gain entry to the United States based on his false and willful representation to being a citizen of the United States and the concealment of the material fact that he was a native and citizen of Trinidad, an alien to the United States not in possession of proper immigration documents to enter, pass through or reside in the United States.

Your deponent further states that based on personal observation and investigation made during the normal tour of duty your deponent observed Milton Everest Mitchell standing for about six hours in the vicinity of the Rainbow Bridge and the Niagara Falls bus station appearing to be waiting for someone; and that during that time a taxi cab bearing two female passengers, Jacquetta Barron and Patsy Gully, was inspected at the Rainbow Bridge and a drivers license belonging to Milton Everest Mitchell was found in Patsy Gully's purse; and subsequently the two same women appeared again at the Rainbow Bridge driving a Mercedez-Benz automobile registered to Milton Everest Mitchell.

The complainant further states that this complaint is based on the fore mentioned observations and information and that based on those observations and information that your deponent and Border Patrol Agent Robert J. Stille questioned Milton Everest Mitchell in front of the Niagara Falls bus station and Milton Everest Mitchell made oral statements to your deponent and Robert J. Stille admitting that he was a citizen of Trinidad, born in Port of Spain, Trinidad and that he had falsely represented himself to be a citizen of the United States and that he no longer had the New York birth certificate having destroyed it and that he was an alien to the United States and did not possess immigration documents permitting him to be in the United States.

MPH:mf
75-3247

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

NELSON EVEREST MITCHELL,

Petitioner,

- v -

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR REVIEW OF ADMINISTRATIVE AGENCY ACTION

- x

INDEX TO ADMINISTRATIVE RECORD

1. Decision of the Board of Immigration Appeals dated September 18, 1975.

2. Memorandum to the Board of Immigration Appeals.

3. Motion to reconsider dismissal of appeal dated August 15, 1975.

4. Brief in support of motion to reconsider dismissal of appeal dated August 15, 1975.

5. Petitioner's affidavit in support of motion to reconsider dismissal of appeal dated August 14, 1975.

6. Affidavit submitted on behalf of petitioner's motion to reconsider dismissal of appeal dated August 14, 1975 with attachments.

7. Decision of Board of Immigration Appeals dated July 28, 1975.

8. Cover letter and supplemental brief dated April 10, 1975.

9. Complaint charging violation of 8 U.S.C. 1325.

10. Oral argument before the Board of Immigration Appeals dated March 19, 1975.

11. Notice of entry of appearance as attorney dated March 19, 1975.

12. Memorandum for the file dated February 24, 1975.

13. Letter to petitioner's attorney from Immigration and Naturalization Service dated January 21, 1975 with Service answering brief.

14. Petitioner's brief on appeal to the Board of Immigration Appeals submitted January 17, 1975.

15. Petitioner's motion to reopen deportation proceedings dated January 16, 1975.

16. Letter to Immigration and Naturalization Service from petitioner's attorney dated December 23, 1974.

17. Letter to petitioner's attorney from Immigration and Naturalization Service dated December 13, 1974.

18. Notice of appeal to the Board of Immigration Appeals dated August 13, 1974.

19. Oral decision of the Immigration Judge dated August 6, 1974.

20. Transcript of deportation hearing dated August 6, 1974.

21. Order to show cause and notice of hearing dated August 5, 1974.

Respectfully submitted,

THOMAS J. CAHILL,
United States Attorney for the
Southern District of New York,
Attorney for Respondent.

MARY P. MAGUIRE,
Special Assistant United States Attorney,
Of Counsel.

(2)

COPY RECEIVED
Thomas J. Cahill
UNITED STATES ATTORNEY
2-3-76.